No. 02-516

Supreme Court, U.S.
FILED
MAR 24 2003
CLERK

In The
Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

and

EBONY PATTERSON, et al.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

MICHAEL E. ROSMAN
HANS BADER
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D.C. 20036
(202) 833-8400

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue
Edelson Building
Suite 200
Wyandotte, MI 48192
(734) 281-7100

DAVID F. HERR
Counsel of Record
KIRK O. KOLBO
R. LAWRENCE PURDY
MICHAEL C. MCCARTHY
KAI H. RICHTER
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The University's Use of Racial Preferences in Admissions Is Not Justified by a Compelling Interest	1
II. The University's Use of Racial Preferences Is Not Narrowly Tailored	12
III. The University's Use of Racial Preferences Violates 42 U.S.C. § 1981	20
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 1, 2, 8

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) 11

Batson v. Kentucky, 476 U.S. 79 (1986) 5

Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993) 11

Brown v. Board of Education, 347 U.S. 483 (1954) 2, 6, 9

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 18

Easley v. Cromartie, 532 U.S. 234 (2001) 3

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 11

Fullilove v. Klutznick, 448 U.S. 448 (1980) 3

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) 20

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) 14, 18

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) 14

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 1, 2, 3, 8

Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996) 13

TABLE OF AUTHORITIES – Continued

Page

Peters v. Kiff, 407 U.S. 493 (1972) 4

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 8, 9

Plessy v. Ferguson, 163 U.S. 537 (1896) 2, 3, 9

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Roe v. Wade, 410 U.S. 113 (1973) 8

Rothe Develop. Corp. v. United States Department of Defense, 262 F.3d 1306 (Fed. Cir. 2001) 18

United States v. Paradise, 480 U.S. 149 (1987) 17

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 9

Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 11

Washington v. Davis, 426 U.S. 229 (1976) 9

Wygant v. Jackson Board of Education, 476 U.S. 266 (1986) 5, 20

STATUTES AND RULES:

42 U.S.C. § 1981 20

Sup. Ct. R. 15.2 20

MISCELLANEOUS:

William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 U. MICH. L. Rev. 1917 (1999) 7

WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998) 7, 19

TABLE OF AUTHORITIES – Continued

Page

STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY (2003) 7

Stacy Berg Dale & Alan Kreuger, *Estimating the Payoff to Attending A More Selective College: An Application of Selection on Observables and Unobservables*, National Bureau of Economic Research Working Paper No. 7322 (1999) 7

Alan M. Dershowitz & Laura Hanft, *Affirmative Action And The Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379 (1979) 14

JOHN H. MCWHORTER, LOSING THE RACE (2000) 19

Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve Education?*, 15 INT'L J. PUB. OP. 8 (2003) 6

Terrance Sandalow, *Minority Preferences Reconsidered*, 97 U. MICH. L. REV. 1874 (1999) 7

Terrance Sandalow, *Rejoinder*, 97 U. MICH. L. REV. 1923 (1999) 7

Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583 (1999) 7

PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT (2003) 7

ARGUMENT

I. The University's Use of Racial Preferences in Admissions Is Not Justified by a Compelling Interest.

A. There should be no mistaking what the University of Michigan ("University") and its higher education *amici* are asking this Court to rule. They seek a standard of review for racial preferences in admissions that is defined by vested deference in these institutions to use race and ethnicity in the manner and to the extent that they judge best for everyone concerned. *See, e.g.*, Resp. Br. 21-32; Brief for Harvard University, *et al.* as *Amicus Curiae* 28 ("a matter of educational judgment"); Brief for Columbia University, *et al.* as *Amicus Curiae* 15 ("higher degree of deference"); Brief for Amherst College, *et al.* as *Amicus Curiae* 26 ("substantial deference"); Brief for University of Pittsburgh, *et al.*, as *Amicus Curiae* 13 ("deference"); Brief for Judith Areen, *et al.* (Law Deans) as *Amicus Curiae* 25, filed in *Grutter v. Bollinger* (No. 02-241) ("substantial deference"). Far from having any support in the modern precedents of this Court, the view urged by respondents and the institutions that support them represents a breathtaking departure from the demands of strict scrutiny, to which all governmental racial classifications must be subjected. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

A "deferential" standard of review is completely incompatible with one premised on "skepticism" and requiring "a most searching examination." *Id.* at 223. The exemption from this standard that the University seeks for itself and other educational institutions is based on a claim that educators can be trusted to use race only for proper purposes and then only to the extent necessary to achieve them. This is merely a formulation of the argument that strict scrutiny should not apply when a racial classification is being used for allegedly "benign" reasons. *See Metro Broad., Inc. v.*

FCC, 497 U.S. 547, 564-65 (1990), *overruled by Adarand*, 515 U.S. at 226. Its troubles are well known. "Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not." *Metro Broad.*, 497 U.S. at 635 (Kennedy, J., dissenting). The policies here are certainly not benign with respect to those individuals who are disadvantaged by the preferences.

Moreover, a right to discriminate founded on "academic freedom," as respondents and their *amici* would have it founded, necessarily entails the near certainty that educators will have differing notions about what purposes could justify differential treatment on the basis of race. A standard of deference genuinely derived from the First Amendment provides no principled basis for distinguishing between "good" and "bad" academic theories for different kinds of racial classifications.

The argument made by educators that they should be left with the task of deciding whether and how to employ racial classifications in the service of educating their students is one that has been made and rightly rejected before by this Court. It should not be given credence now, fifty years after *Brown v. Board of Education*, 347 U.S. 483 (1954), even when made by those who run the Nation's most selective and prestigious institutions.

Hand in hand with the argument for a deferential standard of review is the one made for subjecting racial preferences in admissions to a test of reasonableness, like the one employed in *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896), that is applied to review of ordinary government classifications. *See, e.g.*, Brief for NOW Legal Defense and Education Fund as *Amicus Curiae* 11-12, 16; Brief of Judith Areen, *et al.* (Law Deans) as *Amicus Curiae* 3, filed in *Grutter v. Bollinger* (No. 02-241).[1] It would be as wrong

[1] The Governor of the State of Michigan has even made the remarkable argument that the Michigan Constitution cloaks the

(Continued on following page)

today to apply such a standard to racial classifications as it was to do so more than one hundred years ago in *Plessy*.

Ultimately it is important to understand the scope of the discretion that respondents and their educational *amici* seek permission to exercise. They seek discretion to decide which groups get a plus for race, and which ones get a minus. Discretion would also presumably extend to deciding how to determine whether someone has the racial or ethnic characteristics necessary to receive a conferred preference, an issue that will presumably become only more difficult (and arbitrarily resolved) as our society becomes increasingly inter-racial.[2] Finally, respondents lay claim to decide for themselves how much of the selected type of racial and ethnic diversity to pursue to realize the "educational concept" on which all this race discrimination and racial balancing are justified.[3]

University with authority to consider race in the admissions process. Brief for Michigan Governor Jennifer Granholm as *Amicus Curiae* 13-17.

[2] *See Metro Broad.*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (noting "the difficulties, both practical and constitutional, with the task of defining members of racial groups"). Educational institutions will get to grapple with the same kind of problem that was presented in *Plessy*, where it was necessary to decide whether Plessy, who was seven-eighths caucasian, was properly assigned to the separate railway car for "persons not of the white race." *See also Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) ("If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8-9 (1946)."). *See also Metro Broad.*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) ("Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).").

[3] Respondents suggest that they may use race as a factor in admissions as long as it is not the "predominant" factor. Resp. Br. 20 n.29. However, the test they cite is used to determine whether race-neutral means should be subjected to "strict scrutiny." *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 241 (2001). *See also* Brief for Harvard

(Continued on following page)

B. While the University rests its plea for deferential review on its status as an educational institution, recognizing the interest it articulates as compelling is almost certain to have implications reaching far outside the field of education. First, if disparities among racial groups on such matters as test scores can justify racial preferences on a theory that the disparities are the product of historical discrimination, *see* Resp. Br. 32, there is no principled reason to confine the rationale to educational testing. It could be equally well argued, for example, that disparities among racial groups in employment testing should justify the same kind of disparate treatment that respondents defend in this case (and in *Grutter v. Bollinger*).

Second, once one accepts the proposition that race is a legitimate proxy for experience and that exposure to diverse races is a *compelling* interest of the highest order, there are few race preferences that cannot be justified. If student understanding improves when exposed to marginally larger numbers of preferred minorities, so should jurors' understanding improve. Indeed, this Court has repeatedly explained how jurors' diverse experiences can aid the jury in understanding a case. *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (Marshall, J.) ("exclusion [of a segment of the community from jury service] deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented"); *id.* at 510-11 (Burger, C.J., dissenting) ("I completely agree that juries should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' . . . is surely enriched when all voices can be heard."). Yet the rule this Court derives from that conclusion is not a rule for race-norming predominantly-white or sex-norming predominantly-male

University, *et al.* as *Amicus Curiae* 18. This case, of course involves the use of explicit racial preferences, to which it is undisputed that strict scrutiny applies, as respondents concede that their use of race must be narrowly tailored to achieve a compelling interest.

juries to insure that such broad perspectives are heard and considered. Rather, the rule is one of hard and fast race and sex neutrality. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting) ("utterly irrational" to conclude that race should be considered in selecting members of a jury).[4] The Court has not tolerated the use of race as a factor in selecting juries when it is just one among many factors considered, or to the point it is not considered too much in the good faith exercise of discretion by judges and attorneys, acting as officers of the court. The rule should not be any different when it comes to admissions officers making choices among individuals in the valuable award of places in the class in our Nation's colleges and universities.

The claims for diversity made by the University can also be made just as easily in the employment context. Indeed, some of the University's *amici* have already made them. For example, General Motors, in addition to justifying racial preferences in higher education to improve its "bottom line," has even adopted the University's jargon by noting the "manifold benefits of having a critical mass of people of color and persons of different ethnicities in . . . upper ranks" of corporate management. Brief for General Motors Corporation as *Amicus Curiae* 12, 23; *id.* at 13 (noting General Motors has "made diversity a 'core business objective'"); *id.* at 23 ("There can be little doubt that racial and ethnic diversity in senior leadership of the corporate world is *crucial* to our Nation's economic

[4] The University's suggestion that consideration of race would somehow taint the juror's impartiality is opaque and unexplained. Resp. Br. 26 n.38. The ability to bring a "new perspective" ought not to compromise anyone's ability to remain impartial, and the University offers no reason why it should. And if it does, then presumably it also would compromise a student's ability to pursue knowledge and truth, a pursuit which lies at the core of any educational experience and is the end for which the much-touted "atmosphere of speculation" is just a means.

prospects.") (emphasis added). Because respondents and the corporate *amici* justify racial preferences in university admissions in large part for the benefits said to accrue to post-school careers and in the work place, it is hard to understand why the interest would be compelling in assembling a student body, but not a workforce. *See also* Brief for 65 Leading American Businesses as *Amicus Curiae* 1 (arguing that "diverse work force" is essential).

C. Respondents seek to bolster their claim for an exception to the prohibitions of the Equal Protection Clause with reference to social science findings on the educational benefits for diversity. The scope of individual rights guaranteed by the Constitution should not be a matter to be decided in academic conferences and scholarly journals. The defendant school boards offered much testimony of educators, psychiatrists, and psychologists to support their respective positions on the great issue decided in *Brown v. Board of Education* and its related cases. *See* Brief for The Center for Equal Opportunity, *et al.* as *Amicus Curiae* 21-26. That evidence did not affect the central holding of *Brown*, nor could *Brown* ever be subject to change on a mere showing or claim that it is no longer supported by empirical evidence. It is no more tolerable that respondents seek to justify their unequal treatment of individuals like Jennifer Gratz and Patrick Hamacher on such a basis.

It is far from the case, moreover, that there is any consensus in the social science community about the empirical claims made for diversity. For example, a study published recently in a peer-reviewed journal reached conclusions that are quite different and inconsistent with those of respondents' witness, Patricia Gurin,[5] whose work

[5] *See* Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve Education?* 15 INT'L J. PUB. OP. 8 (2003).

has been widely criticized by others as well.[6] The conclusions and methodology of William Bowen and Derek Bok in their book *The Shape of The River* have also been challenged by others,[7] including by a former Dean of the University of Michigan Law School.[8] A recent study sponsored by the same Mellon Foundation that underwrote the project discussed in *The Shape of the River* reached conclusions that racial preferences are not helpful and, are, indeed, harmful to the intended beneficiaries. *See* STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY 205-06, 344 n.25 (2003). The state of controversy on the subject is such that no constitutional principle should depend on one set of findings or another.

D. Respondents have tried to bootstrap their argument that Justice Powell's lone opinion with respect to diversity in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stated a majority rationale

[6] *See* Brief for National Association of Scholars as *Amicus Curiae* 6-30.

[7] *See, e.g.*, Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River* 46 UCLA L. REV. 1583 (1999). For a discussion of the history of the diversity concept, *see* PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT (2003).

[8] *See* Terrance Sandalow, *Minority Preferences Reconsidered*, 97 U. MICH. L. REV. 1874 (1999). The article generated a response from Professors Bok and Bowen and a reply from Professor Sandalow. William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 U. MICH. L. REV. 1917 (1999); Terrance Sandalow, *Rejoinder*, 97 U. MICH. L. REV. 1923 (1999).

Even the seemingly uncontroversial proposition that the beneficiaries of race preferences themselves are advantaged from having attended more selective colleges has been questioned. Stacy Berg Dale & Alan Kreuger, *Estimating the Payoff to Attending A More Selective College: An Application of Selection on Observables and Unobservables*, National Bureau of Economic Research Working Paper No. 7322 (1999) (using same database as Bok & Bowen, researchers conclude that students who attended more selective colleges do not earn more than other students who were accepted and rejected by comparable schools but attended less selective colleges).

with their assertion that it has generated "settled expectations," in the manner considered in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). Resp. Br. 18. This Court used the framework set forth in *Casey* to consider whether it should overrule a precedent set in a case by a 7-2 majority. It is precisely because of the fractured nature of the *Bakke* opinions and their failure to produce a majority rationale[9] supporting a specific non-remedial use of race that "principles of *stare decisis*, as articulated in *Casey*," do not resolve the parties' dispute. Resp. Br. 17.

In any event, the factors of reliance and stability discussed in *Casey* have no application here for reasons which relate to the nature of the rights involved and the effect of the judicial decision with respect to them. Unlike *Casey* and the case it considered, *Roe v. Wade*, 410 U.S. 113 (1973), Justice Powell's opinion in *Bakke*, to the extent it joined with Justice Brennan's opinion to reverse the California Supreme Court's injunction against the use of race, did not identify an individual right, but rather a *limitation* on such a right (to equal protection). No individual can rely upon such limits because the state agency or its superior can ignore the limit and bolster the right – just as Virginia Tech has recently done, and just as the states of California, Washington, and Florida have done with the right to equal protection by forbidding racial considerations in, among other things, university admissions. Because it only declared a limit on a right, Justice Powell's opinion could not (even if it had been joined by four or more other Justices) have "call[ed] the contending

[9] *See also Adarand*, 515 U.S. at 257 (Stevens, J., dissenting) ("Thus, prior to *Metro Broadcasting*, the interest in diversity had been mentioned in a few opinions, but *it is perfectly clear* that the Court *had not yet decided* whether that interest had sufficient magnitude to justify a racial classification.") (emphasis added).

sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 505 U.S. at 867. The controversy would persist because states and federal fund recipients are free under the Constitution to bolster the right of equal protection and to eliminate race as a consideration. *Bakke*, 438 U.S. at 379 (Brennan, J.) ("any State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program").[10]

Even if the remainder of the *Casey* analysis were applicable here, where petitioner does not seek to "overrule" any precedent of the Court, it would not militate in favor of accepting "diversity" as a compelling governmental interest justifying racial preferences. Justice Powell's deferential approach, for reasons already explained, simply cannot be squared with the requirements of strict scrutiny. Moreoever, experience has demonstrated that it is not sensible, realistic, or "[ ]workable," *Casey*, 505 U.S. at 855, to regard an admissions system that *facially* treats applicants differently based on race and ethnicity as if it were one that is "*facially* nondiscriminatory," *Bakke*, 438 U.S. at 318 (Powell, J.) (emphasis added).[11] It requires an intolerable sacrifice of candor in describing actual

[10] Moreover, respondents' reliance arguments to the contrary, *see* Resp. Br. 19, could have been made just as forcefully by states and school districts that operated race-based dual school systems before they were ruled unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954). Like Justice Powell's opinion in *Bakke*, *Plessy* declared a limit on the right of equal protection and did not prevent any state from creating integrated schools.

[11] The cases cited by Justice Powell to demonstrate how the presumption of "good faith" and "legitimate educational purpose," *Bakke*, 438 U.S. at 318-19 & n.53, of a university could be overcome were cases involving *race-neutral* means. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). They offer no guidance in ascertaining how to distinguish between lawful and unlawful *facial* discrimination.

admissions systems to sustain such a contradiction. It is this fiction that explicit racial preferences in admissions can pass a test of facial nondiscrimination that has been the basis for justifying many a racial preference by those wielding them, including preferences bearing little difference, even in form, from what was struck down in *Bakke*. *See* Pet. Br. 43-45 (discussing race-based admissions policies challenged in other cases).[12]

Finally, it is simply strange and perverse to invoke "settled expectations" to defend racial preferences, which the Court has repeatedly stressed should be only "temporary" measures since they conflict with the command of equality contained in the Equal Protection Clause. Under respondents' analysis, the *longer* "temporary" preferences are in place, the *stronger* the argument becomes that they should remain in place. If racial preferences justified on "diversity" grounds have indeed become part of the "national culture" such that their removal would "damage the stability of the society," Resp. Br. 18-19, and if these are reasons that justify their continuance into the 21st Century in spite of the equality guarantee, then the Nation should abandon as pretense the notion that they are "temporary."

E. With respect to the separate claims of the intervenors, they never offer any evidence to dispute the district court's finding that remedying past discrimination was not the purpose behind the race preferences employed by the

[12] Respondents are certainly wrong to suggest that there is anything like a "consensus" in this country supporting the use of race in college and university admissions. To the contrary, polls have repeatedly shown that large majorities oppose the use of race in making such decisions. *See* Brief for National Association of Scholars as *Amicus Curiae* 4-11, in *Grutter v. Bollinger* (No. 02-241) (listing polls, including 2001 joint survey by the *Washington Post*, Kaiser Foundation, and Harvard University that found overwhelming opposition, across racial lines, to use of race as a factor in college admissions); Brief for the Cato Institute as *Amicus Curiae* 14-15 n.10 (same); Brief for the Center for New Black Leadership as *Amicus Curiae* 7 n.6 (same).

University, a point that fatally undermines their argument. *See* Pet. Br. 48. Even ignoring that problem, intervenors never suggest how the scheme of preferences can "remedy" the isolated incidents of discrimination from the staff, instructors, or campus police (Resp. Interv. Br. 12-14) upon which they rely. Indeed, it appears that the preferences have *not* remedied them at all, since the intervenors assert that those incidents continue. *Id.* at 14. They apparently give no thought at all to the possibility that a scheme of race preferences might be the *cause* of some of the racial tension on campus, and have failed to identify why the problem of discriminatory employees or fellow students cannot be resolved in perfectly race-neutral ways (like ridding the University of such individuals).

Intervenors also argue that the scheme of preferences counteracts the discriminatory impact of "economically or politically advantageous criteria" (Resp. Interv. Br. 25) such as geographic preferences and the preference for alumni children. But if such preferences are validly employed by the University, then they cannot be discriminatory.[13] If they are not valid, then they should be eliminated. Intervenors cite no case for the proposition that a state can use race preferences to counteract *ongoing* discriminatory practices *while doing nothing at all about the practices themselves*.[14]

Ultimately, the intervenors demonstrate only that the University's interest in diversity is not compelling. If the

[13] *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) ("[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet and would result in [*inter alia*, race and sex quotas to avoid lawsuits].").

[14] All of the lower courts (including two en banc courts) that have considered such a proposition have rejected it. *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc), quoting *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir. 1993) (en banc); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1572 (11th Cir. 1994).

University insists that it must *balance* the interest in diversity with criteria that have a discriminatory impact *against* its preferred minorities, and that are of questionable educational value (like alumni preferences), then the University itself does not treat the interest as one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). *See also* Brief for Center for Individual Freedom as *Amicus Curiae* 7.

II. The University's Use of Racial Preferences Is Not Narrowly Tailored.

A. For the first time in the more than five years that this case has been pending, respondents have expressly "disavowed" the admissions system that was in place when petitioners Jennifer Gratz and Patrick Hamacher applied to the LSA in 1995 and 1997, respectfully. Resp. Br. 5 n.7. They do so while contending that this Court need not consider the lawfulness of those systems since they have been replaced by the current point-based "selection index" regime and because respondents did not petition for review of the district court's judgment invalidating the systems in place from 1995 to 1998.[15] Resp. Br. 5 n.7.

[15] Respondents vigorously defended in the district court and the court of appeals the systems in place in 1995-1998, with the separate race-based "grid" guidelines (1995-1997), racially-segregated waiting lists, exemption of the preferred minority students from automatic rejection based on low test scores and grades, and "protected spaces" in the class for members of the preferred minority groups. The last three of these egregious features were not abandoned until two years after commencement of the filing of this lawsuit, with the implementation of the 1999 guidelines. At least until the filing of their merits brief in this Court, respondents had consistently expressed the view that *all* of these prior forms of racial preferences were fully consistent with the consideration of race as a "plus" factor in the manner approved in Justice Powell's opinion in *Bakke* and the "Harvard plan" described in his opinion. This new "disavowal" of their earlier systems undermines respondents' arguments that they have "relied" on *Bakke* and that their

(Continued on following page)

Respondents then proceed to discuss the system implemented in 1999 as if it bears no relation to the earlier one, now effectively conceded by them to be unlawful.

What respondents simply ignore is that by their own admission the current system was statistically designed to produce the "same outcomes" as the former one.[16] *See* Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment 20, filed May 3, 1999 (district court Record No. 81). They have demonstrated only how easy it is to convert a preference from one form to another. As Justice Brennan observed in *Bakke*, Davis could have accomplished what it did through a fixed award of places in the class for disadvantaged minorities by instead "adding a set number of points to the admission rating of disadvantaged minority applicants." *Bakke*, 438 U.S. at 378 (Brennan, J.).[17] In respondents' case, the converse proposition is equally true. The unlawfulness of the current system can thus be perceived both

current mechanical award of a fixed number of points for race is merely a "plus" in the manner approved by Justice Powell.

[16] The history of the change from the grid system to the "linear" selection-index system was explained in a University document as due to the "anti-affirmative action climate." App. 277.

[17] The Sixth Circuit, with an apt illustration, made the same point in another case involving racial preferences in employment:

> [W]e note that quotas and preferences are easily transformed from one into the other. Certainly, where the ranking criteria are already known, the correspondence is exact. In our case, if it were deemed objectionable to admit that there was a 1:1 quota, exactly the same result could have been reached by adding 20 points to the score of each minority applicant. . . . A pre-existing commitment to a fixed amount of preference . . . has the result, in any given case, of determining exactly the proportion of the favored group that will be selected.

Middleton v. City of Flint, 92 F.3d 396, 412-13 (6th Cir. 1996).

on its own terms and in the way that it is simply a transparent disguise for the now "disavowed" system.[18]

B. It is hard to understand how respondents can seriously suggest that their mechanical award of a fixed number of points for racial status "hews closely to the 'plus' system" that Justice Powell approved in *Bakke*. Resp. Br. 32. There is nothing remotely like it discussed in either Justice Powell's opinion or in his description of the "Harvard plan" discussed in (and appended to) it.[19]

Central to Justice Powell's approach was the consideration of race on an "individualized, case-by-case basis." *Bakke*, 438 U.S. at 319 n.53 (Powell, J.). He wrote that race "may be deemed a 'plus' in a *particular* applicant's file . . . [and that] [t]he file of a *particular* black applicant may be *examined* for diversity. . . . " *Id.* at 317. No reasonable reading of this language can be considered consistent with the University's use of race, which amounts to "automatically and blindly," *Johnson v. Transp. Agency*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring), giving *every* member of one of the preferred groups a fixed "plus" for race in the award of 20 points. The only respect in which a file is "examined for diversity" for the purpose of assigning the rigid "plus" is to determine whether an

[18] It is notable and telling that while the *amici* on the University's side in this case and in *Grutter v. Bollinger* (No. 02-241) defend in often abstract terms an interest in "diversity" as a justification for racial preferences, few of them articulate in any specific way a defense of the particular policies at issue in these cases.

[19] As the dissenters noted in *Grutter v. Bollinger*, 288 F.3d 732, 799 (6th Cir. 2002) (Boggs, J., dissenting) (*Grutter* Pet. App. 137a), one can only be "deeply puzzled" regarding a claim that an admission system operates just like the Harvard plan, *see* Resp. Br. 33-34, when there was no evidence in *Bakke* about the actual operation of that plan. *See* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 383 n.13 (1979) (noting that the percentage of African Americans in Harvard classes from 1973 through 1981 was 7% in every year but one, when it was 8%).

applicant has checked the box indicating that he or she is a member of one of the preferred racial or ethnic groups.

The University's defense of the automated and rigid manner in which race is considered in its system gives its game away. The stated objective is to get "meaningful" numbers of students from specified races, Resp. Br. 38, regardless of their personal experiences, backgrounds, or perspectives (since these characteristics are not looked to in the award of points). In no sense can the University's racial preference be said to be narrowly tailored to achieving diversity of perspective or experience; narrowly tailoring to those objectives would naturally require looking *directly* for such perspectives and experiences, rather than using race as a proxy for educational diversity. Instead, the only objective to which the University's racial preferences can be said to be closely tailored is achieving a specific racial result – admission of all members of the preferred minorities who meet the minimum academic requirements of the University. That is what the original grid-based guidelines were "set" to accomplish, App. 80; and those are the guidelines that the current selection index system was statistically designed to reproduce. In this respect, the University's objective is not different from the specific racial result that the Davis program sought, except that Davis did not design a system intended to admit *all* qualified minority students and only permitted disadvantaged minorities to receive a special benefit.

The University tries to back away from statements of its own admissions officers that the goal of the institution is to admit all qualified minorities.[20] *See* Resp. Br. 5 n.6. It does so by noting that the specific reference to this aspect of the system was removed beginning with the 1999 policy (again, two years after the litigation commenced). *Id.* The University neglects to mention that, as noted above, the

[20] *See* Pet. Br. 4; Cir. App. 331-39, 355-56, 362, 367, 383-84.

objective of admitting all qualified minority students is statistically built into the guidelines, a fact the University cannot change by simply removing a reference to it in the policy. It should come as no surprise, then, that just as the old system resulted in admission of "virtually all qualified" minority students, so too does the current one. Pet. App. 111a. It is disingenuous, in view of the record and the respondents' insistence everywhere else that they *must* have their preferences to get their desired racial result, to argue that this phenomenon is just a "backward-looking description of admissions outcomes in light of the small pool of qualified [preferred] minority applicants." Resp. 39.

By describing the difference in admissions outcomes between qualified minorities receiving a preference and other groups on the basis of the *size* of the *racial pools*, respondents are making an even more telling point – competition occurs *within* the pools, but not *across* them, or at least not between the preferred and disfavored pools. Because the University "receives *many more* applications than it has available spaces" and "[a] *great many* of these applicants are fully qualified to attend" the University, Resp. Br. 1 (emphasis added), there is no reason why "virtually all" qualified members of one racial group would be admitted while many from other groups are not, *unless the applicants are not competing in a single competitive pool.* It is a tenet of Justice Powell's analysis, however, that applicants from different races compete for admission on the "same footing." *Bakke*, 438 U.S. at 317 (Powell, J.).

A system like the University's, in which there is a policy and practice to admit all (or "virtually all") qualified members of some racial groups, while the rest of the applicants compete based on scarce, available spaces in the class, App. 80-81, is self-evidently one in which applicants do not compete on the "same footing."[21] It is instead

[21] The cumulative and systematic way in which applicants compete on unequal footing based on race is demonstrated also by the use of race

(Continued on following page)

a system that values one individual more than another based on race. This is expressed by the fact the University engages in "intense competition with other selective institutions for these highly sought after [preferred minority] students," Resp. Br. 4, while thousands of those like Jennifer Gratz and Patrick Hamacher must instead, for reasons explained solely by race, compete against other members of the disfavored races for a spot in the class. Whatever it can mean to have race "weighed fairly," *Bakke*, 438 U.S. at 318 (Powell, J.), in the award of a valuable benefit, this surely cannot be it.

C. In addition to failing the test of constitutionality that respondents hold out as the controlling one – Justice Powell's in *Bakke* – the University's admission system falls far short under traditional narrow-tailoring requirements. *See, e.g., United States v. Paradise*, 480 U.S. 149, 171 (1987). Even if respondents' stated interest in diversity is assumed to be compelling, the Court's precedents demonstrate the importance of consideration of race-neutral alternatives, which do not impose harms in the nature of stereotype, stigma, and racial hostility that the use of racial preferences entail. The record below reflects primarily respondents' *ipse dixit* determination that there are no available race-neutral alternatives, rather than any genuine consideration by respondents, before they

to "flag" applicants who are not admitted on the basis of their selection index score. One of the threshold qualifications for receiving a "flag" is a minimum selection index score of 75 (non-Michigan residents) or 85 (Michigan residents), *see* Resp. Br. 10, which means that the 20-point bonus for race remains at work in this feature of this system. Moreover, "underrepresented race" status is a separate category that a counselor may use to "flag" an application that meets the other thresholds. *Id.* Such a system plainly gives members of preferred races a competitive advantage over members of other racial groups in having their applications receive "an additional level of in-depth review . . . and a decision based . . . without further reference to the selection index." *Id.* at 35-36. This is so regardless of the fact that admissions counselors have "discretion" to "flag" an application or that non-racial factors can also result in receipt of a "flag."

employed their explicit preferences, of such alternatives. *See, e.g., Rothe Develop. Corp. v. United States Dep't of Defense*, 262 F.3d 1306, 1331 (Fed. Cir. 2001) (District Court erred because "it did not strictly scrutinize whether Congress found these race-neutral alternatives ineffective. . . . On remand, the district court should conduct a probing analysis of the efficacy of race-neutral alternatives . . . by inquiring into any attempts at the application or success of race-neutral alternatives prior to the reauthorization of the . . . program."). While respondents devote much attention to disparaging so-called "percentage" plans, *see* Resp. Br. 42-49, petitioners have not suggested that the University be required to adopt any particular type of policy,[22] and neither have they suggested that the University must or should admit students strictly on the basis of rank order of grades and test scores.

The University's preferences demonstrate no closeness of fit between means and ends, unless the end is "outright racial balancing." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). A narrowly-tailored means of achieving the educational benefits produced by an intellectually and experientially diverse class would look for those characteristics directly, rather than relying on race as a proxy in the inflexible way that the University does. Moreover, as others have explained in exacting detail,[23] the social science evidence relied upon by respondents does

[22] Respondents' expressed disagreement about the wisdom of percentage plans does not change the fact that these plans have produced substantial empirical evidence refuting the notion that race-neutral alternatives are incompatible with the levels of "critical mass" for the "underrepresented" groups that the University's racial preferences seek to ensure. *See* Brief for the United States as *Amicus Curiae* 10-17, in *Grutter v. Bollinger* (No. 02-241); Brief for the State of Florida *et al.* as *Amicus Curiae* 6-8.

[23] *See, e.g., Grutter v. Bollinger*, 288 F.3d 732, 803-06 & n.36 (6th Cir. 2002) (Boggs, J., dissenting); Brief for National Association of Scholars as *Amicus Curiae* 6-28.

not even address such questions as how much racial diversity is needed to produce the educational benefits deemed compelling, or how much educational benefit is attributed to the marginal increases in racial diversity gained with the use of the preferences.

It is certainly not plausible to regard as "flexible" the University's rigid, automatic award of points for race and its determination to admit all qualified members of the preferred races. Respondents' argument that the preferences have only a small effect on the groups disfavored by them, *see* Resp. Br. 37 n.48, repudiates the principle that the Constitution protects the rights of *individuals*, not of racial *groups*, and it also ignores the fact that the same thing could be said about the result in *Bakke*.[24]

Finally, as the district court made clear, there is nothing temporary about respondents' preferences, founded as they are on an interest deemed "permanent and ongoing." Pet. App. 26a. The University tries to distance itself from the district court's assessment by arguing, for the first time in this case, that the "need to consider race and ethnicity in admissions is inherently time-limited because it stems from the disparities in academic qualifications, such as grades and test scores, between minorities and non-minorities."[25] Resp. Br. 32. This reveals an interest as indefinite in time as an interest

[24] For the sixteen spaces set aside by Davis, there were more than 2,000 applicants who did not receive a preference in 1973 and more than 3,000 such applicants in 1974. *Bakke*, 438 U.S. at 273 n.2, 275 n.5.

[25] The newness of this claim by respondents is reflected by their citation to nothing in the record on the point, with their reliance placed instead on secondary sources suggesting that "test score gaps have narrowed." Resp. Br. 32. There is also evidence that the gap has *not* narrowed. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 21 (1998); Brief for the Center for New Black Leadership as *Amicus Curiae* 11. Moreover, one theory for the reason that the gap has remained or widened is that racial preferences create perverse incentives. *See, e.g.*, JOHN H. MCWHORTER, LOSING THE RACE 231-33 (2000).

in remedying the lingering effects of societal discrimination, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986), because, of course, the University has expressed it in precisely those terms.

III. The University's Use of Racial Preferences Violates 42 U.S.C. § 1981.

Respondents assert without elaboration that petitioners did not preserve an argument that they are entitled to prevail under 42 U.S.C. § 1981. *See* Resp. Br. 19 n.25. Petitioners raised the claim in the district court[26] and never argued below that Section 1981 prohibited only the same conduct prohibited by the Equal Protection Clause, so there is nothing new about the contention that the terms of the statute prohibit conduct that the Equal Protection Clause does not. Moreover, the fact that the Court has held that Section 1981 reaches only purposeful conduct, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-90 (1982), does not mean that the statute reaches only the same purposeful conduct prohibited by the Fourteenth Amendment. Section 1981 remains an independent basis on which to reverse the judgment of the court of appeals.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request the Court to reverse the judgment of the district court with respect to the admissions systems in place from 1999 to the present.

---

[26] *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability 38-39, filed May 3, 1999 (district court Record No. 77). Moreover, since the petition specifically identified Section 1981 as a potential source of liability distinct from any illegality based upon "strict scrutiny" analysis under the Equal Protection Clause (e.g., Pet. 28), respondents waived any objection by failing to raise it in their opposition to the petition. Sup. Ct. R. 15.2.

Respectfully submitted,

MICHAEL E. ROSMAN
HANS BADER
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D.C. 20036
(202) 833-8400

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue
Edelson Building
Suite 200
Wyandotte, MI 48192
(734) 281-7100

DAVID F. HERR
Counsel of Record
KIRK O. KOLBO
R. LAWRENCE PURDY
MICHAEL C. MCCARTHY
KAI H. RICHTER
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200